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SUPREME COURT, U.S.

No. 80-6701

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DANIEL ROSS,

Petitioner,

v.

AMOS REED, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 22.6 of the Supreme Court Rules, Petitioner Daniel Ross files this Supplemental Brief to call attention to this Court's action on April 20, 1981, granting certiorari in Engle v. Isaac, No. 80-1430, which raises one of the issues presented in this case.

The issue common to Engle and to this case is whether the "cause" requirement of Wainwright v. Sykes is satisfied where, at the time (in Engle, at trial; in this case, on appeal) that state law required the issue to be raised, there was not yet an authoritative judicial decision recognizing the validity of the issue or any basis for counsel to anticipate it. That issue is better presented in this case than in Engle because the new law, this Court's decision in Mullaney v. Wilbur, was not decided until five and one-half years after Petitioner Ross' appeal was concluded. In Engle, on the other hand, Mullaney had been decided by the time of the petitioners' trials, although it had not yet been applied to the defense of self-defense by the state courts.

The first issue presented by Petitioner Ross -- whether Wainwright v. Sykes applies to the failure to raise an issue on appeal as well as at trial and therefore overrules the holding in Fay v. Noia -- is not part of the Engle case. In Engle, the three petitioners failed to comply with a state rule requiring contemporaneous objection at trial. Ross committed no such procedural default.

The second issue in the Engle case -- whether it violates due process for a state to make self-defense an affirmative defense and put the burden of persuasion on the defendant -- is not necessarily presented in Ross' case. At Ross' trial the court instructed the jury that Ross had the burden of proving lack of malice as well as self-defense, thus presenting a clear violation of Mullaney v. Wilbur.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served one copy of the foregoing Supplemental Brief in Support of Petition for Writ of Certiorari by mailing it, first class postage prepaid, addressed as follows:

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DATE: June 18, 1981

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